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FAX COVER SHEET

TO: **Acting State Director (attention: lease sale protest)**

 # OF PAGES (INCLUDING COVER SHEET): 31

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Acting State Director
Bureau of Land Management
Utah State Office
P.O. Box 45155
Salt Lake City, UT 84145

31 October 2005

Re: Protest of BLM's Notice of Competitive Oil and Gas Lease Sale of Parcels Involving Habitat with High Conservation Value and/or Occurring on Forest Service Land

Dear Acting Director:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Center for Native Ecosystems protests the sale of the following lease parcels:

UT1105-055: white-tailed prairie dog habitat, Price River Citizens' Wilderness Proposal
UT1105-059: white-tailed prairie dog habitat
UT1105-061: white-tailed prairie dog habitat
UT1105-062: white-tailed prairie dog habitat, Lost Spring Wash Citizens' Wilderness Proposal
UT1105-063: white-tailed prairie dog habitat, Lost Spring Wash Citizens' Wilderness Proposal
UT1105-091: white-tailed prairie dog habitat
UT1105-092: white-tailed prairie dog habitat
UT1105-111: Heart of the West Conservation Plan Corridor
UT1105-117: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern
UT1105-118: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern
UT1105-120: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern
UT1105-122: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern, Coal Canyon Citizens' Proposed Wilderness, Diamond Canyon Citizens' Proposed Wilderness
UT1105-123: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern
UT1105-124: white-tailed prairie dog habitat, nominated Cisco Complex white-tailed prairie dog Area of Critical Environmental Concern
UT1105-142: Gunnison's prairie dog habitat

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UT1105-159: Manti-La Sal National Forest, Price River Roadless Area
UT1105-160: Manti-La Sal National Forest, Oak Knoll Roadless Area
UT1105-161: Manti-La Sal National Forest, Price River Roadless Area
UT1105-162: Manti-La Sal National Forest, Oak Knoll Roadless Area, Price River Roadless Area
UT1105-163: Manti-La Sal National Forest
UT1105-164: Manti-La Sal National Forest, Oak Knoll Roadless Area, Price River Roadless Area
UT1105-165: Manti-La Sal National Forest, Price River Roadless Area
UT1105-166: Manti-La Sal National Forest, Oak Knoll Roadless Area
UT1105-167: Manti-La Sal National Forest, Oak Knoll Roadless Area
UT1105-168: Manti-La Sal National Forest, Price River Roadless Area
UT1105-173: Ashley National Forest, Roadless Area, Heart of the West Conservation Plan Duchesne Core
UT1105-174: Ashley National Forest, Roadless Area, Heart of the West Conservation Plan Duchesne Core
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UT1105-187: Ashley National Forest, Roadless Area, Heart of the West Conservation Plan Duchesne Core
UT1105-188: Ashley National Forest, Roadless Area, Heart of the West Conservation Plan Duchesne Core

The grounds for the Protest follow.

I. Protesting parties

CNE has a longstanding record of involvement in management decisions and public participation opportunities on public lands including federal lands managed by the BLM. CNE's mission is to use the best available science to participate in policy and administrative processes, legal actions, and public outreach and education to protect and restore native plants and animals in the Greater Southern Rockies. Members and professional staff of CNE are involved in research, advocacy, and protection efforts for the special status and imperiled species within the sale parcels. Staff and members use and enjoy these lands and intend to visit the subject lands to observe and monitor such habitat and population conditions. Staff have closely networked with wildlife and other professionals at responsible agencies to assess and improve the status of habitat and populations. Leasing these parcels with inadequate stipulations harms the interest of CNE's staff and members.

Protesters therefore have legally recognizable interests that will be adversely affected and impacted by the proposed action.

Jacob Smith, Executive Director, like all employees of CNE is authorized to file this protest on the organization's behalf.

II. Statement of Reasons

For the reasons set forth below, BLM must withdraw the protested parcels pending RMP revision or completion of necessary Supplemental Environmental Impact Statements (SEISes). Although any significant leasing violates the spirit and intent of RMP revision, this protest focuses only on the most objectionable parcels – those that contain habitat with high conservation value. BLM should withdraw all protested parcels because there is credible evidence of resource conflicts and potentially significant environmental impacts which have not been properly analyzed. Removing the disputed parcels will reduce the offerings to a level that will limit interference with ongoing RMP revision. Whether to lease these lands, and if so subject to what conditions and mitigation measures, are decisions properly made after the RMP revision is finalized.

A. Background information on white-tailed prairie dog status and management

CNE has commented extensively to the Utah State Office and various Field Offices about the imperiled status of the white-tailed prairie dog. This protest addresses, in part, parcels offered for sale that include the Cisco Complex, which CNE has nominated as an Area of Critical Environmental Concern (ACEC) because of its relevance and importance as one of the largest white-tailed prairie dog complexes and because of its value as recovery habitat for this species. Here we incorporate by reference our ESA listing petition for the white-tailed prairie dog (CNE *et al.* 2002a) as well as our white-tailed prairie dog ACEC nominations (CNE *et al.* 2003).

In August 2004 the BLM completed its evaluation of the nomination for the Cisco Complex ACEC, and found that the area met both the relevance and importance criteria. The BLM (BLM,

Moab Field Office 2004) stated, "The habitat within this area is essential for maintaining this species" (p. 11). The evaluation also stated that the white-tailed prairie dog "is declining throughout the West, including the area managed by the Moab Field Office. Large tracts of land are needed to maintain populations of this animal and of the predator species which depend on it. White tailed [sic] prairie dog habitat is fragile and very sensitive to OHV abuse, overgrazing, drought and oil and gas disturbance" (pp. 11-12).

The BLM should not lease portions of the nominated Cisco Complex ACEC while the Moab RMP is being revised.

As we have explained in our November 2003, February 2004, June 2004, September 2004, December 2004, February 2005, May 2005, and August 2005 protests (all of which we incorporate here by reference), relying on a lease notice is inadequate because it limits the BLM to requiring operators to move proposed wells no more than 200 meters. In some of the protested parcels, wells could not be moved 200 meters or less and still avoid prairie dog colonies and/or buffers. The notice also allows for waivers, exceptions, and modifications, and delays protections to the APD stage, whereas NEPA requires an up-front analysis of impacts.

The BLM also appears to have attached the Threatened and Endangered Species Act Stipulation to all parcels in the sale. Now that the white-tailed prairie dog has been added to the Utah Sensitive Species list, this stipulation should apply, but it only requires operators to abide by the BLM's restrictions if ignoring them would result in jeopardy to an ESA-listed species or adverse modification to designated critical habitat – protections already afforded by the ESA itself. Once again the BLM is confirming that absent ESA listing the BLM refuses to employ the regulatory mechanisms necessary to prevent imperiled species from becoming threatened with extinction.

We protested the BLM's leasing in white-tailed prairie dog habitat in February and November of 2003, appealed the BLM's protest denial in August 2003 (*CNE vs. BLM, IBLA 2003-352*), and protested leasing in white-tailed prairie dog habitat in February, June, and August, December of 2004, and February, May, and August of 2005 and hereby incorporate by reference all of these documents and all references they contain.

B. NEPA prohibits interim actions that have adverse environmental impacts and/or limit the choice of reasonable alternatives.

Leasing these parcels now, while most of Utah's Field Offices are developing new Resource Management Plans and while ACEC nominations for the areas in question are being considered violates NEPA's prohibition on interim actions:

> Until an agency issues a record of decision . . . no action concerning the proposal shall be taken which would:
>
> (1) Have an adverse environmental impact; or
> (2) Limit the choice of reasonable alternatives.

40 C.F.R § 1506.1(a).

1. Leasing the disputed lands would undermine the RMP revision process.

Most of Utah's Field Offices are currently developing draft RMPs and EISes for plan revision. The Vernal RMP is designated a Time Sensitive Plan (TSP) critically in need of revision; the Moab RMP dates to 1985; the Richfield RMP dates to between 1982 and 1991; and the Monticello RMP dates to 1991. However, RMP revision will be a waste of taxpayers' money and participants' time if the BLM approves leasing in the planning areas prior to RMP revision. Instead of approving leasing of key wildlife and plant habitat -- and opening the floodgates for a wave of new APDs on these sensitive lands, these Field Offices should focus on revising the RMPs in a timely fashion and managing exploration and development under *existing* leases.

Past agency directives correctly recognized that *any* leasing will constrain the choice of reasonable alternatives. Therefore, the agency followed a policy of no new leasing – even of lands designated open – for areas undergoing RMP revisions focused on oil and gas development. Absent such policy, any new leasing must be conditioned on findings that adequate NEPA analysis has been performed. This has not occurred. In addition, the Washington Office released a new IM on August 13, 2004 confirming that State Directors have discretion to delay leasing during plan revision. The new IM (2004-110 Change 1) clearly states "The State Directors have discretion to temporarily defer leasing on specific tracts of land based on information under review during planning" (p. 1) and directs the BLM as follows: "All SOs are to consider temporarily deferring oil, gas and geothermal leasing on federal lands with land use plans that are currently being revised or amended" (p. 2).

Under no circumstances should BLM approve new leasing of sensitive lands while the RMP revisions go forward. Offering sensitive lands without adequate NEPA analysis cannot proceed independently of the RMP revisions.

In January 2003, the Wyoming BLM published the FEIS and proposed Plan Amendment for the Powder River Basin Oil and Gas Project. In that document, BLM took the position that it was obligated to accommodate full development scenarios in all three "action" alternatives. In the Powder River FEIS, the BLM WSO advanced the dubious assertion that federal agencies "have a legal obligation to ensure that leased federal minerals are fully developed . . .the Mineral Leasing Act and 43 CFR 3100 requires maximum ultimate economic recovery of oil and gas from leased lands." FEIS Volume 1 at 2-68. In that FEIS, BLM analyzed the same number of wells (23,863 under federal ownership and 15,504 for non-federal ownership for a total of 39,367) for alternatives 1, 2A and 2B in rejecting citizen-proposed alternatives for staged rate or phased development.

Although we do not agree with these assertions found in the Powder River FEIS, they appear to be BLM's current interpretation of the law. Therefore, BLM's position that they are obligated to assume some development will proceed before approving proposed lease sale parcels precludes a required no action or conservation NEPA analysis. It follows that leasing should not be approved if higher development scenarios have not been analyzed, may have unacceptable environmental impacts, or would exceed the RFD scenario for the management area.

For example, in November 2003 EnCana Oil and Gas USA, Inc. indicated that it would push the BLM and Wyoming Oil and Gas Conservation Commission to authorize 5-acre well spacing in the Jonah Field. EnCana is also seeking off-site mitigation so that the entire Jonah Field can become an "industrial area", according to EnCana spokesman Steve Reynolds (Bleizeffer 2003). These are real possibilities for Utah as well, some of which are already playing out on tribal lands in the Uinta Basin, and the BLM should not open any more areas to oil and gas development until it thoroughly evaluates the potential impacts associated with its current leasing programs through the RMP revision process.

The BLM presently has the opportunity to plan for rational, environmentally sound development of energy resources in the planning areas while protecting other uses of these lands—as required by law. Allowing leasing *prior* to the RMP revisions will sacrifice this opportunity – without taking a hard look at the consequences. The BLM and the public will have lost the chance to prevent the haphazard, poorly planned development that characterized other federal lands in the Rockies.

FLPMA requires that land management actions be "in accordance with the land use plans developed" by the Secretary of the Interior. 43 U.S.C. § 1732(a). The regulations provide that "resource management action[s] shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b). "All resource management authorizations and actions and detailed and specific planning undertaken subsequent to the RMP must conform to the RMP. . . BLM is required to manage . . . as outlined in the RMP, until or unless the RMP is amended pursuant to 43 CFR 1610.5-5." Marvin Hutchings, 116 IBLA 55, 62 (1990).

During the RMP Amendment process, land use decisions should not prejudice the alternatives or range of decisions to be considered for an area. See Southern Utah Wilderness Alliance et al., 111 IBLA 207, 212, (1989) (striking down BLM approval of application for jeep trip where proposal was not properly analyzed under NEPA and was contrary to the existing RMP); Uintah Mountain Club, 112 IBLA 287 (1990) (striking down BLM off-road vehicle route designation which did not conform to the approved RMP).

One of the critical issues the BLM addresses during RMP amendment is whether and which areas should be open to leasing in the first place. BLM Handbook 1624, Planning For Fluid Mineral Resources (or H-1624-1). H-1624-1, for instance, requires BLM in the amendment/revision process to look at areas open to leasing in any capacity, open to leasing with restrictions, open to leasing with No Surface Occupancy and areas open to leasing with special stipulations of conditions of approval. (H-1624-1, Ch. IV. B., C.2). "During the amendment or revision process, the BLM should review all proposed implementation actions [this includes oil and gas leasing] through the NEPA process to determine whether approval of a proposed action would harm resource values so as to limit the choice of reasonable alternative actions relative to the land use plan decisions being reexamined." H-1601-1 at VII.E.

Leasing *prior* to the RMP revisions will undermine the planning process. As an irretrievable commitment of resources, leasing will severely limit the range of alternatives. This violates the amendment process and agency policy.

NEPA §102(2)(C)(v) was intended to ensure that environmental impacts would "not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989). "The appropriate time for considering the potential environmental impacts of oil and gas exploration and development under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), is when BLM proposes to lease public lands for oil and gas purposes because leasing, at least without NSO stipulations, constitutes an irreversible and irretrievable commitment of resources by permitting surface disturbing activities in some form and to some extent." Wyoming Outdoor Council, 156 IBLA 347 (2002). See also Colorado Environmental Coalition, 149 IBLA 154, 156 (1999); Sierra Club v. Peterson, 717 F.2d 1409, 1414-15 (D.C. Cir. 1983); Wyoming Outdoor Council, 153 IBLA 379 (2000) (emphasis added).

The BLM has the opportunity to learn from the planning mistakes and resulting environmental damage occurring in federally managed oil and gas fields elsewhere in the Rockies. In the Powder River Basin in Wyoming and Montana, the Upper Green Country in Wyoming, and Farmington, New Mexico, the BLM leased out practically all mineral lands under its jurisdiction *before* conducting required analyses of the impacts of such a blanket leasing program. When a high percentage of lands are under lease, the BLM has severely limited its ability to limit environmental impacts.

BLM needs to comply with NEPA, FLPMA and other applicable law through the RMP revisions *before* leasing more lands for oil and gas development. At the post-leasing phase, the BLM has already made an irretrievable commitment of resources. Leasing ties the BLM's hands and it loses the opportunity to consider such alternatives as no leasing, leasing subject to NSO, phased development, baseline data collection, and mitigation measures identified through the NEPA process. See Doing It Right, A Blueprint for Responsible Coal Bed Methane Development in Montana -- http://www.northernplains.org/Issues/CBM/Do_It_Right_Index.asp.

The Vernal RMP revision is a TSP because the BLM recognizes that the current planning direction needs to be updated to consider new circumstances. The Moab Field Office's own RMP revision website states:

> The current land use plan was prepared for the Moab Field Office in 1985. Since then, there have been considerable changes within the area. There has been tremendous growth in recreation activities such as mountain biking and off-highway vehicle use. There has been heightened public awareness regarding conflicts between recreational activities and oil and gas development. Also, new data is available for bighorn sheep, antelope, and Mexican spotted owls.
>
> As part of the planning process BLM is mandated to consider nominations for potential Areas of Critical Concern (ACEC) and nominations of rivers for potential inclusion in the Wild and Scenic Rivers System. (available online at: http://moabrmp.com/)

The existing RMPs are inadequate and outdated for current and reasonably anticipated levels of oil and gas development. There is an urgent need for comprehensive planning and consistent

management direction. It appears that the existing RMPs and EISes are largely useless to agency professionals charged with managing the impacts of oil and gas development and protecting other uses on these public lands. For example, the Vernal BLM appears to be requiring field-specific Environmental Assessments as a stopgap measure for lands already leased. However, this procedure loses sight of the larger picture. It is a haphazard, stopgap measure designed to compensate for the outdated RMP.

The environmental community is committed to working with the BLM constructively on the RMP revision process. The BLM needs to acknowledge that new leasing – while the revision process is ongoing -- will render the RMP revisions largely moot.

2. Granting valid rights may prejudice management prescriptions for nominated ACECs.

On Janurary 21, 2003, CNE and others (2003a) submitted nominations to the Moab Field Manager and others for the designation of specific large white-tailed prairie dog complexes and subcomplexes as Areas of Critical Environmental Concern (ACECs) under the Federal Land and Policy Management Act (FLPMA) of 1972, 43 U.S.C. § 1701, *et seq.* and the Administrative Procedure Act 5 U.S.C. § 551 *et seq.*, and pursuant to BLM Manual 1613.21.A.2.a and 1613.41. These areas included the Cisco Complex.

FLPMA requires "In the development and revision of land use plans, the Secretary shall…give priority to the designation and protection of areas of critical environmental concern" (Title II, Sec. 202(c)(3)). By leasing within the areas nominated by CNE and even BLM staff while the Moab RMP is being revised, the BLM is seriously hampering its ability to protect these areas as ACECs.

The presence of oil and gas leases should have no bearing on whether an area meets the criteria for ACEC designation, but may prejudice the development of ACEC management prescriptions, as the draft Vernal RMP EIS indicates. BLM Manual 1613.22.A states:

> Identify Factors Which Influence Management Prescriptions….These factors are important to the development of management prescriptions for potential ACEC's. Factors to consider include, but are not limited to, the following:….
> 8. Relationship to existing rights. What is the status of existing mining claims or pre-FLPMA leases? How will existing rights affect management of the resource or hazard?

Granting valid and existing rights in these areas before ACEC designation is fully considered and management prescriptions are developed clearly could both have an adverse environmental impact and limit the choice of reasonable alternatives for the management of these areas. These parcels should be withdrawn until RMP revision is completed and the nominated ACECs are evaluated and management prescriptions are developed. It simply makes no sense for the BLM to waste its opportunity to designate ACECs that could help conserve major white-tailed prairie dog complexes and the species associated with them. Not only is this poor judgment, it is also a violation of NEPA, FLPMA, and the BLM Manual.

C. NEPA requires that the BLM supplement EISs when new information or circumstances arise.

The Bureau of Land Management must analyze significant recent information relevant to environmental concerns in the affected area before actions such as the proposed leasing may proceed. If the BLM fails to do so, CEQ regulations will require preparation of a supplemental analysis before the proposal may proceed.

CEQ regulations implementing NEPA explicitly recognize that circumstances may arise after completion of an EIS that create an obligation for supplemental environmental review. According to 40 C.F.R. § 1502.9(c)(1), a supplemental EIS is required when:

> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

An agency also has discretion to prepare a supplemental statement if doing so would "further the purposes of" NEPA. 40 C.F.R. § 1502.9(c)(1)(iii).

The United States Supreme Court validated the CEQ regulations in 1989, holding that a supplemental environmental review must be performed when:

> there remains "major federal action" to occur, and the new information is sufficient to show that the remaining action will "affect the quality of the human environment" in a significant manner or to a significant extent not already considered . . .

Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989). The *Marsh* opinion confirms that an agency's duty to comply with NEPA is ongoing, and continues even after the agency has made its decision based on an EIS. Id. The Supreme Court reasoned:

> It would be incongruous with this approach to environmental protection, and with [NEPA's] manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Id. at 371. A majority of federal courts are in agreement.

CEQ guidance concerning NEPA's implementation state that "if the proposal has not yet been implemented, EISs that are more than 5 years old should be carefully reexamined to determine if [new circumstances or information] compel preparation of an EIS supplement."

1. Changes in the status of the white-tailed prairie dog and Gunnison's prairie dog have occurred, and significant new information is available, including regional conservation plans.

These RMPs are being revised in part to deal with much significant new information, including changes in the status of imperiled species that will be affected by leasing in these parcels.

This information meets several of NEPA's significance criteria. For example, oil and gas leasing in these areas will affect the "unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas" (40 C.F.R. § 1508.27(b)(3)). Leasing in these areas also "may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration" (40 C.F.R. § 1508.27(b)(6)). Leasing these parcels is also "related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into component parts" (40 C.F.R. § 1508.27(b)(7)) because cumulative impacts are clearly of concern – in terms of both the cumulative impacts of leasing the combination of protested parcels and the cumulative impacts associated with leasing these parcels in conjunction with all of the other sensitive habitat in the area that has already been leased. Leasing these parcels may also meet this test of significance: "Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" (40 C.F.R. § 1508.27(b)(7)) since, for example, the BLM's action is contributing to the need to list the white-tailed prairie dog, sage grouse, and pygmy rabbit under the ESA.

a. White-tailed prairie dog

The relevant RMPs did not consider the imperiled status of the white-tailed prairie dog, and the BLM has not presented the necessary evidence that it did consider new information on prairie dog status before deciding to lease these parcels. Simply having the data in hand is not the same as analyzing the implications.

In the Vernal Field Office's wildlife resource review for the February 2003 sale, reviewers Steve Madsen, Tim Faircloth, and Mary Hammer determined that the special status species stipulation would NOT be adequate to protect white-tailed prairie dogs. For each parcel containing colonies they wrote:

> A portion of this lease parcel contains white-tailed prairie dog (*Cynomys leucurus*) populations, which have been petitioned for listing under the Endangered Species Act. Federal agencies are responsible for ensuring actions on federal lands do not contribute to the need to list a species under the ESA. Future development on portions of this parcel occupied by white-tailed prairie dogs may lead to a decline in population numbers and available habitat, subsequently leading to their listing under the ESA. **It is recommended that the portions of the parcel containing white-tailed prairie dog populations be eliminated from leasing consideration.** (emphasis added)

The BLM's Answer to CNE's Statement of Reasons regarding our appeal of the February 2003 sale (IBLA 2003-352) suggests that the agency recognizes that the Diamond Mountain and Book

Cliffs RMPs' oil and gas leasing discussions do not adequately address Sensitive species, the black-footed ferret, and the white-tailed prairie dog. The BLM states:

> In its [21 December 2002] DNA, the Vernal office recommended that 38 parcels in their entirety and 6 parcels in part be withheld from lease sale (Ibid. [AR vol. 4A] at Tab Vernal, pp. 9-20). **The rationale for recommending that these parcels be withheld from lease sale involved sensitive species and cultural resource conficts, among other reasons**. (Ibid.). As for the parcels approved for leasing, the Vernal Office recommended that the special status species stipulation quoted above be included in every lease because of the presence of the listed black-footed ferret, a candidate species (the white-tailed prairie dog), and state sensitive species. (AR vol. 1, Tab Final List; Tab Vernal, Sub-tab VFO Specialist-reviews).
>
> On December 20, 2002, the Utah State Office accepted in full the recommendations from the field offices - including the insertion of the special status species stipulation into every lease - and published its final notice...(p. 4, emphasis added)

This passage is illuminating for several reasons. First, it explains that the parcels withdrawn before publication of the final February 2003 list were removed partly because of sensitive species concerns, and presumably these concerns extended to some of the very areas that CNE is protesting now (because so many of the parcels we are protesting include habitat for Sensitive species). Also, the BLM evidently is confused about the white-tailed prairie dog's status - sadly, the white-tailed prairie dog is not yet a Candidate for ESA listing. Later in the same Answer to CNE's Statement of Reasons, the BLM states, "BLM has reserved ample authority under the special status species stipulation to prevent any significant harm to the white-tailed prairie dog" (p. 14).

Since December 2002, FWS has made recommendations to the BLM about additional notices and stipulations that they feel are required to protect the white-tailed prairie dog, and their recommendations have become more stringent over time. In its set of comments from May 28, 2004), FWS states

> We recommend lease notifications identifying the occurrence of white-tailed prairie dog colonies or habitat be added to all the parcels that either contain existing or historic prairie dog habitat. **Stipulations should specify a no surface occupancy of at least 500 meters surrounding the prairie dog colonies.** (p. 10, emphasis added)

The BLM has failed to heed the advice of FWS.

In addition to items pointed out throughout the rest of this protest and our other protests, below we list more evidence of new information and changed circumstances regarding the white-tailed prairie dog that are not thoroughly considered in the relevant RMPs. The BLM must take a "hard look" at this information and consider whether leasing with the current stipulations (or lack thereof) is really appropriate.

In September of 2005, the multistate Prairie Dog Conservation Team (which represents the state wildlife agencies that manage white-tailed prairie dogs) finalized the White-tailed Prairie Dog Conservation Assessment (Seglund *et al.* 2005), which concluded, "Loss of habitat due to oil/gas development under current Bureau of Land Management policies may be a significant threat" (p. v). The Conservation Assessment cited the following flaws in existing RMPs:

> Oil and gas development is occurring at an unprecedented rate and because much of this development is occurring on BLM lands, the BLM should incorporate WTPD management into Land Use Plans. The WTPD Working Group recommends that the BLM add the WTPD to their list of sensitive species to insure long-term, effective management of this species. Many BLM Field Offices currently do not consider this species in oil and gas development unless it is associated with black-footed ferret reintroduction efforts. Because of this, the BLM does not address WTPD species-specific needs, but addresses the WTPD as black-footed ferret habitat. In addition, they do not address maintaining habitat for expansion or shifts in occurrence outside of currently mapped colonies. The BLM also addresses impacts at a colony level rather than a complex or landscape level. Finally, RMPs do not address the impacts of road development and the potential for an increase in shooting/direct take of WTPDs as a result of oil and gas development. The WTPD Working Group recommends that the BLM should clearly designate where WTPD habitat protection will be a priority. The Working Group also recommends that BLM WTPD management emphasis be shifted from black-footed ferret management to management of WTPDs as a sensitive species. (p. 51)

The multistate team's recommendations included the following: "project design of oil and gas facilities in and adjacent to occupied and suitable habitat should include location of wells and roads outside of these areas, consideration of directional drilling when wells are proposed within suitable and occupied habitat, timing restrictions of vehicle travel to periods when WTPDs are less active, and regulation of vehicle traffic type" (p. 53). The assessment also states, "Special protection for large WTPD complexes should be employed by designating them as ACECs or 'special management areas' on public lands" (p. 64).

The assessment concludes the following about the threat of oil and gas drilling:

> This impact has the potential to rise to the level of a threat to the continued existence of the species, and therefore has the potential to justify listing under the ESA in the foreseeable future. Oil and gas exploration is occurring at a phenomenal rate on public lands. Since the BLM manages 55% of the land in the WTPD predicted range, significant impacts are possible, primarily during development of oil and gas fields with close well spacing and associated roads. As previously stated in this Conservation Assessment, recent data from Colorado, Wyoming, and Utah indicate that WTPD complexes shift on a landscape scale, possibly in response to plague or other factors not currently identified. Therefore all suitable habitat within and adjacent to complexes must be protected from direct habitat loss on a landscape scale if expansion opportunities are to be retained. Current BLM policies do not adequately protect WTPDs during oil and gas development. With the increased amount of leasing and oil and gas development in the WTPD range (77% of the WTPD gross range in Wyoming has the potential to be impacted by oil and gas development) this could lead to the need for listing the species under the ESA. Revision of BLM Land Use Plans to control leasing and development in WTPD complexes to address prairie dog

> management needs and maximize habitat potential must be initiated on a state-by-state basis to prevent further, more drastic actions, including listing the WTPD under the ESA. (p. 68)

On November 9, 2004, FWS published a negative preliminary finding on our ESA listing petition for the white-tailed prairie dog. We believe that the finding was politically motivated rather than being based on the best available science, and we plan sue the Service over violations of the ESA and Administrative Procedures Act in making this erroneous finding. However, the finding itself still presents new information that is relevant here. For example, the finding states that 55% of the white-tailed prairie dog's occupied habitat in Utah is already leased for oil and gas drilling (69 Fed. Reg. 64895 (Nov. 9, 2004)). The finding also reports that neither the Vernal nor Moab RMPs currently specifically address white-tailed prairie dog protection (69 Fed. Reg. 649899 (Nov. 9, 2004)), and that the revised RMPs will include "protections similar to those for species protected under the ESA" – this will be impossible for habitat that has already been leased once the RMPs are adopted.

b. Gunnison's prairie dog

Many of the problems associated with oil and gas drilling in white-tailed prairie dog habitat apply to the Gunnison's prairie dog as well. In conjunction with Forest Guardians we have petitioned for ESA listing for the Gunnison's prairie dog, and we hereby incorporate that petition by reference. Leasing in habitat for this prairie dog absent adequate stipulations is not appropriate. The final Conservation Assessment has also been completed for this species, and the BLM should carefully consider its conclusions.

c. Heart of the West Wildland Network Design

Several of the protested parcels include portions of Heart of the West Wildlands Network Design Core Areas or corridors (Wild Utah Project 2004). This network design was released in March 2004, and the relevant RMPs do not consider the new information that this design presents.

Core areas

> are defined as wilderness, or wilderness-like areas, managed so as to maintain ecological processes and biodiversity within them. Cores serve as the 'backbone' of a wildlands network and are designated to protect those landscape features that are either underrepresented elsewhere, critical for focal species viability, or are nearly irreplaceable in terms of their rare and important biota. (Wild Utah Project 2004, p. 42)

Corridors (or linkages)

> serve to link core areas so wildlife can move between them, while also allowing evolutionary and ecological processes (e.g. fire, succession, predation, etc.) to continue operating within an otherwise fragmented system. By ensuring that plants and animals have unsevered connections to other population centers,

> linkages can prevent or mitigate deleterious population-level effects resulting from isolation – such as inbreeding, low genetic diversity, and extirpation, and may actually increase the population sizes, viability, and movement of habitat-restricted species. (Wild Utah Project 2004, p. 42, citations omitted)

Because the BLM has not carefully evaluated the ecological importance of these areas before offering these parcels for lease, the parcels must be withdrawn or an SEIS completed.

2. Leasing for CBM exploration or development would violate the RMPs and NEPA.

Some of these lands appear to have potential for coalbed methane development. These parcels must be withdrawn because adequate NEPA analysis regarding the unique impacts of coalbed methane development has not been conducted (*See e.g.* Pennaco Energy, 266 F.Supp.2d 1323 (D.Wyo., 2003); Wyoming Outdoor Council, 156 IBLA 347 (2002)). The BLM must supplement RMPs with EISs that evaluate the unique impacts of coalbed methane, and the recent Pennaco ruling underscores this. Until the BLM meets its NEPA burden it must withdraw these parcels or stipulate that coalbed methane development is prohibited and that only oil or conventional gas development may take place.

CBM impacts will be analyzed in the RMP revisions. Until such analysis has occurred and appropriate measures enacted, BLM cannot lease lands for CBM development. Among the impacts requiring a "hard look" under NEPA are aquifers, groundwater quantity and quality, air quality, management practices, produced water, water wells, irrigation water quality, grazing issues, wildlife habitat, and soil erosion.

D. BLM's Alleged NEPA "Analysis" – A Self Styled "Determination of NEPA Adequacy" – Was Insufficient

An examination of the record BLM relied upon in making the leasing decision at issue illustrates the inherent flaws in its chosen procedures to comply with NEPA. BLM has elected to document land use plan conformance and NEPA adequacy for oil and gas leasing through the use of determinations of NEPA adequacy ("DNAs"), which are intended to assist the agency in determining "whether [it] can rely on existing NEPA documents for a current proposed action," and, if so, to assist in recording its rationale. Importantly, DNAs are a BLM construct and are not found or authorized in the Council on Environmental Quality's NEPA regulations. *See* 40 C.F.R. Part 1508 (describing EIS, EA, and categorical exclusion requirements). The foundation documents for these DNAs are the broad, generalized RMPs and subsequent supplements that, in most cases, are decades old and only contain general information about oil and gas exploration and development.

Importantly, the DNAs prepared by BLM to sanction oil and gas leasing do not engage in any site-specific analysis. Instead, they merely repeat the broad, programmatic language used in the field office-wide RMPs.

Thus, BLM's decision to sell and issue the non-NSO oil and gas leases at issue was a violation of NEPA, which requires "up-front" environmental analysis and disclosure before the agency engages in an irreversible commitment of resources. *See Southern Utah Wilderness Alliance*, 159 IBLA at 241-43 (citing *Friends of the Southeast's Future*, 153 F.3d at 1063) (additional citations omitted).

The recent Pennaco ruling addresses the use of DNAs rather than preparing additional NEPA documents prior to leasing:

> in this case, the BLM did not prepare such an EA, did not issue a FONSI, and did not prepare any environmental analysis that considered not issuing the leases in question. Instead, the BLM determined, after filling out DNA worksheets, that previously issued NEPA documents were sufficient to satisfy the "hard look" standard. DNAs, unlike EAs and FONSIs, are not mentioned in the NEPA or in the regulations implementing the NEPA. See 40 C.F.R. § 1508.10 (defining the term "environmental document" as including environmental assessments, environmental impact statements, findings of no significant impact, and notices of intent). As stated, agencies may use non-NEPA procedures to determine whether new NEPA documentation is required. For reasons discussed above, however, we conclude the IBLA's determination that more analysis was required in this case was not arbitrary and capricious.

E. The BLM is failing to coordinate with FWS

Throughout this protest we have noted the BLM's consistent rejection of FWS's recommendations to protect habitat for imperiled species. The BLM must heed the advice of its sister agency and cease leasing in these sensitive areas until new information about these species is considered and the RMPs are revised.

The BLM must stop and take a hard look at the impacts that its oil and gas program is having on Utah's natural resources. The BLM has instead chosen to dismiss the assessments of FWS's staff (as well as BLM's own resource management staff) as"the non-binding opinions of a few within the Department of Interior" (BLM's 9 January 2004 Answer to CNE's Statement of Reasons, IBLA 2003-352). There is little point in the BLM soliciting input from FWS if it does not intend to take the expertise of FWS's biologists seriously.

F. BLM failed to take a "Hard Look" at the impacts of the lease sale and subsequent activities to Sensitive species

BLM Manual 6840 (Special Species Management) permits BLM State Directors to designate, "usually in cooperation with State wildlife agencies . . 'sensitive species.'" Once the BLM designates sensitive species, those species are afforded at least "the protection provided for candidate species." Id. BLM Manual 6840 further details what protections BLM must afford to "candidate species," including "ensur[ing] that actions authorized, funded, or carried out do not contribute to the need to list any of these species as T/E [threatened and endangered]." Id. at 6840.06C. Regarding animals, Utah BLM has adopted the Utah Sensitive Species list. The

BLM consequently is obliged to identify and evaluate the impacts of its actions on these species. The BLM failed, in this instance, to identify, survey for, or evaluate potential impacts to these species, including impacts to the white-tailed prairie dog and Gunnison's prairie dog.

The BLM must meet NEPA's requirements to provide site-specific analysis that is up-to-date and considers the cumulative impacts of oil and gas development in the region, both in terms of sensitive species and more generally.

G. The BLM has ignored the assessments of its own expert staff

We stated above that the BLM's own expert staff have recommended against leasing white-tailed prairie dog habitat and all areas in the Vernal Field Office until plan revision is complete. The BLM has dismissed its the assessments of its staff of the potential harms of leasing as follows:

> CNE relies on excerpts of letters from certain biologists from BLM and the United States Fish and Wildlife Service (USFWS) requesting BLM to withdraw these parcels from consideration or to insert stipulations protecting the white-tailed prairie dog. (CNE's SOR, at pp. 30-31). However, these excerpts provide no new information on environmental consequences, but merely make recommendations as to how BLM should proceed based on the information available. If anything, these excerpts show that there is no new significant information to trigger NEPA supplementation and that BLM's decision was well informed. In any event, these excerpts present the non-binding opinions of a few within the Department of Interior, and there is noting in the quoted language that constitutes new information." (BLM's 9 January 2004 Answer to CNE's Statement of Reasons, p. 11)

Even if the BLM's decision to ignore the information on environmental consequences that its own staff presented in reviewing the lease parcels was "well informed", it was also misguided. By marginalizing their expert assessments as "merely...recommendations" and the "opinions of a few" the BLM has called into question the integrity of its entire resource review process. Futhermore, this flippant response suggests that the BLM may not be willing to take the requisite "hard look" at potential environmental consequences even when those consequences are flagged by its own employees.

H. The determination that the lease notices and stipulations applied are sufficient is arbitrary and capricious

While NEPA does allow the agency to institute mitigating measures in order to render the action "insignificant," in this case the BLM wholly failed to do so. Before the BLM can rely on lease notices as a mitigation measure, it is "required to adequately study any measure identified as having a reasonable chance of mitigating a potentially significant impact of a proposed action and reasonably assess the likelihood that the impact will be mitigated to insignificance by the adoption of that measure." *Klamath Siskiyou Wildlands Ctr.*, 157 IBLA 332, 338 (2002). "NEPA requires an analysis of the proposed mitigation measures and how effective they would be in reducing the impact to insignificance." *Id.* (quoting *Powder River Basin Resource Council*, 120 IBLA 47, 60 (1991).

The record is completely devoid of any support for the agency's summary conclusion that the stipulations will effectively mitigate impacts on imperiled species from oil and gas development.

Nor does it address how such measures would preserve the values of nominated ACECs. The record itself establishes that the BLM failed to analyze the proposed measures and their effectiveness, as required under NEPA.

The special Lease Notices do not provide the BLM with the necessary flexibility to protect imperiled species. Nor do the Lease Notices satisfy FWS's recommendations for stipulations. Choosing to lease these parcels is thus "arbitrary and capricious."

I. BLM is failing to protect Sensitive species as required

Instruction Memorandum (IM) 97-118, issued by the national BLM office, governs BLM Special Status Species management and requires that actions authorized, funded, or carried out by BLM do not contribute to the need for any species to become listed as a candidate, or for any candidate species to become listed as threatened or endangered. It recognizes that early identification of BLM sensitive species is advised in efforts to prevent species endangerment, and encourages state directors to collect information on species of concern to determine if BLM sensitive species designation and special management are needed.

Additionally, if Sensitive Species are designated by a State Director, the protection provided by the policy for candidate species shall be used as the minimum level of protection. BLM Manual 6840.06. The policy for candidate species states that the "BLM shall carry out management, consistent with the principles of multiple use, for the conservation of candidate species and their habitats and shall ensure that actions authorized, funded, or carried out do not contribute to the need to list any of these species as threatened/endangered." BLM Manual 6840.06. Specifically, BLM shall:

(1) Determinate the distribution, abundance, reasons for the current status, and habitat needs for candidate species occurring on lands administered by BLM, and evaluate the significance of lands administered by BLM or actions in maintaining those species.
(2) For those species where lands administered by BLM or actions have a significant affect on their status, manage the habitat to conserve the species by:
    a. Including candidate species as priority species in land use plans.
    b. Developing and implementing rangewide and/or site-specific management plans for candidate species that include specific habitat and population management objectives designed for recovery, as well as the management strategies necessary to meet those objectives.
    c. Ensuring that BLM activities affecting the habitat of candidate species are carried out in a manner that is consistent with the objectives for those species.
    d. Monitoring populations and habitats of candidate species to determine whether management objectives are being met.
(3) Request any technical assistance from FWS/NMFS, and any other qualified source, on any planned action that may contribute to the need to list a candidate species as threatened/endangered.

BLM Manual 6840.06.

Despite this clear guidance, and the suspected presence of numerous Sensitive Species on the parcels we are protesting, there is little evidence that BLM is fulfilling these obligations. Specifically, BLM failed to 1) conduct surveys and/or inventories necessary to determine the distribution and abundance of Sensitive Species, 2) assess the reasons for the current status of Sensitive Species, 3) evaluate the potential impacts of leasing and subsequent oil and gas activities on Sensitive Species, 4) develop conservation strategies for Sensitive Species and ensure that the activities in question are consistent with those strategies, 5) monitor populations and habitats of Sensitive Species, and, potentially 6) request appropriate technical assistance from all other qualified sources.

J. BLM failed to adequately consider Sensitive species in its RMPs and in supplemental NEPA analyses

BLM Manual § 1622.1 refers to "Fish and Wildlife Habitat Management" and contains specific language requiring the BLM in the RMP process to, among other things:

1) Identify priority species and habitats . . .
2) [E]stablish objectives for habitat maintenance, improvement, and expansion for priority species and habitats. Express objectives in measurable terms that can be evaluated through monitoring.
3) Identify priority areas for HMPs [Habitat Management Plans] . . .
4) Establish priority habitat monitoring objectives . . .
5) Determine affirmative conservation measures to improve habitat conditions and resolve conflicts for listed, proposed, and candidate species.

BLM Manual § 1622.11(A)(1) – (A)(3). The RMPs to which this leasing is tiered do not meet these obligations, and BLM did not take appropriate steps to remedy these failings before initiating this lease sale. In fact, BLM does not appear to have conducted any additional NEPA analysis beyond that conducted for the RMPs themselves.

K. The BLM has not adequately considered the cumulative impacts of its oil and gas leasing programs throughout the ranges of imperiled species and in conjunction with sagebrush dieoff

NEPA requires that the BLM consider direct, indirect, and cumulative impacts to the environment. The BLM obviously has not taken a "hard look" at the cumulative impacts that its oil and gas programs are having throughout the West.

The BLM must take a "hard look" at the potential additive impacts that oil and gas leasing in these parcels may have considering that much of Utah has experienced a massive sagebrush die-off in the past few years. Wildlife that depended on sagebrush are already extremely stressed and have experienced significant habitat loss – the BLM must examine how additional oil and gas development in these sagebrush die-off areas could affect these animals.

L. The BLM should consider not leasing these parcels

Colorado Environmental Coalition and others raised the following arguments for not leasing parcels in their May 2004 protest of the Colorado oil and gas lease sale, and we wish to raise them as well:

> NEPA Requires the BLM to Analyze Impacts of Oil and Gas Development before Issuing Leases
>
> The BLM must analyze the impacts of subsequent development prior to leasing. The BLM has not analyzed Protesters' documentation of special surface values that will be permanently compromised by future development. Therefore, the BLM cannot defer all site-specific analysis to later stages such as submission of Applications for Permit to Drill ("APDs") or proposals for full-field development. Just as it's futile to bar the gate after the animals have escaped, law and common sense require the agencies to analyze the impacts to proposed wilderness areas before issuing leases. Because stipulations and other conditions affect the nature and value of development rights conveyed by the lease, it is only fair that potential bidders are informed of all applicable lease restrictions before the lease sale.
>
> An oil and gas lease conveys "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. §3101.1-2. This right is qualified only by "[s]tipulations attached to the lease; restrictions deriving from specific, nondiscretionary statutes; and such reasonable measures as may be required by the authorized officer to minimize adverse impacts to other resource values, land uses or users not addressed in the lease stipulations at the time operations are proposed." 43 C.F.R. § 3101.1-2.
>
> Unless drilling would violate an existing lease stipulation or a specific nondiscretionary legal requirement, the BLM argues lease development must be permitted subject only to limited discretionary measures imposed by the surface managing agency. However, moving a proposed wellpad or access road a few hundred feet will generally fall short of conserving wilderness characteristics unless the well was proposed for the very edge of the proposed wilderness. Accordingly, the appropriate time to analyze the need for protecting site-specific resource values is *before* a lease is granted.
>
> Sierra Club v. Paterson established the requirement that a land management agency undertake appropriate environmental analysis prior to the issuance of mineral leases, and not forgo its ability to give due consideration to the "no action alternative," 717 F.2d 1409 (D.C. Cir. 1983). This case challenged the decision of the Forest Service ("FS") and BLM to issue oil and gas leases on lands within the Targhee and Bridger-Teton National Forests of Idaho and Wyoming without preparing an EIS. The FS had conducted a programmatic NEPA analysis, then

recommended granting the lease applications with various stipulations based upon broad characterizations as to whether the subject lands were considered environmentally sensitive. Because the FS determined that issuing leases subject to the recommended stipulations would not result in significant adverse impacts to the environment, it decided that no EIS was required at the leasing stage of the proposed development. Id. at 1410. The court held that the FS decision violated NEPA:

Even assuming, arguendo, that all lease stipulations are fully enforceable, once the land is leased the Department no longer has the authority to preclude surface disturbing activities even if the environmental impact of such activity is significant. The Department can only impose "mitigation" measures upon a lessee . . . Thus, with respect to the [leases allowing surface occupancy] the decision to allow surface disturbing activities has been made at the leasing stage and, under NEPA, this is the point at which the environmental impacts of such activities must be evaluated.

Id. at 1414 (emphasis added). The appropriate time for preparing an EIS is prior to a decision "when the decision-maker retains a maximum range of options" prior to an action which constitutes an "irreversible and irretrievable commitments of resources[.]" Id. (*citing* Mobil Oil Corp. v. F.T.C., 562 F.2d 170, 173 (2nd Cir. 1977)); *see also* Wyoming Outdoor Council, 156 IBLA 347, 357 (2002) *rev'd on other grounds by* Pennaco Energy, Inc. v. US Dep't of Interior, 266 F.Supp.2d 1323 (D. Wyo. 2003).

The court in Sierra Club specifically rejected the contention that leasing is a mere paper transaction not requiring NEPA compliance. Rather, it concluded that where the agency could not completely preclude all surface disturbances through the issuance of NSO leases, the "critical time" before which NEPA analysis must occur is "the point of leasing." 717 F.2d at 1414. This is precisely the situation for disputed CWP parcels.

In the present case, the BLM is attempting to defer environmental review without retaining the authority to preclude surface disturbances. None of the environmental documents previously prepared by BLM for examine the site-specific impacts of mineral leasing and development to the CWP areas. The agency has not analyzed the new information, nor has it assessed what stipulations might protect special surface values. This violates federal law by approving leasing absent environmental analysis as to whether NSO stipulations should be attached to the CWP lands.

Federal law requires performing NEPA analysis before leasing, because leasing limits the range of alternatives and constitutes an irretrievable commitment of resources. Deferring site-specific NEPA to the APD stage is too late to preclude development or disallow surface disturbances of CWP lands.

NEPA Requires the BLM to Consider NSO and No-Leasing Alternatives Prior to Leasing

The requirement that agencies consider alternatives to a proposed action further reinforces the conclusion that an agency must not prejudge whether it will take a certain course of action prior to completing the NEPA process. 42 U.S.C. §4332(C). CEQ regulations implementing NEPA and the courts make clear that the discussion of alternatives is "the heart" of the NEPA process. 40 C.F.R. §1502.14. Environmental analysis must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a). Objective evaluation is no longer possible after agency officials have bound themselves to a particular outcome (such as surface occupation within these sensitive areas) by failing to conduct adequate analysis before foreclosing alternatives that would protect the environment (i.e. no leasing or NSO stipulations).

When lands with wilderness characteristics are proposed for leasing, the IBLA has held that, "[t]o comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed." Sierra Club, 79 IBLA at 246. Therefore, formal NEPA analysis is required unless the BLM imposes NSO stipulations.

Here, the BLM has not analyzed alternatives to the full approval of the leasing nominations for the CWP, such as NSO and no-leasing alternatives. 42 U.S.C. § 4332(2)(C)(iii). Federal agencies must, to the fullest extent possible, use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment. 40 C.F.R. § 1500.2(e). "For all alternatives which were eliminated from detailed study," the agencies must "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Wyoming Outdoor Council held that the challenged oil and gas leases were void because BLM did not consider reasonable alternatives prior to leasing, including whether specific parcels should be leased, appropriate lease stipulations, and NSO stipulations. The Board ruled that the leasing "document's failure to consider reasonable alternatives relevant to a pre-leasing environmental analysis fatally impairs its ability to serve as the requisite pre-leasing NEPA document for these parcels." 156 IBLA at 359 *rev'd on other grounds by* Pennaco, 266 F.Supp.2d 1323 (D.Wyo., 2003)(holding that when combined NEPA documents analyze the specific impacts of a project and provide alternatives, they satisfy NEPA). The reasonable alternatives requirement applies to the preparation of an EA even if an EIS is ultimately unnecessary. *See* Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 US 1066 (1989). Therefore, the BLM must analyze reasonable alternatives under NEPA prior to leasing.

Here, lease stipulations must be designed to protect the important wilderness resources in the CWP areas. The agency, at a minimum, must perform an alternatives analysis to determine whether or not leasing is appropriate for these parcels given the significant resources to be affected and/or analyze whether or not NSO restrictions are appropriate. In this case, CEC believes that the proposed lease sale parcels cannot lawfully proceed unless NSO stipulations are added for all parcels within these sensitive areas. Thus, the BLM's failure to perform an alternatives analysis to determine the appropriateness of such restrictions in advance of leasing is arbitrary, capricious, and an abuse of discretion.

BLM Has Discretion Not to Lease the Challenged Parcels

BLM has broad discretion in leasing federal lands. The Mineral Leasing Act ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a). In 1931 the Supreme Court found that the MLA "goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare." U.S. ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A later Supreme Court decision stated that the MLA "left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove mineral leasing of public lands.

When a leasing application is submitted and before the actual lease sale, no right has vested for the applicant or potential bidders--and BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved." Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966). *See also* Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) ("[R]efusing to issue [certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior"); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [MLA] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory"); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) ("[T]he Secretary has discretion to refuse to issue any lease at all on a given tract"); Pease v. Udall, 332 F.2d 62 (C.A. Alaska) (Secretary of Interior has discretion to refuse to make any oil and gas leases of land); Geosearch, Inc. v. Andrus, 508 F. Supp. 839 (D.C. Wyo. 1981) (leasing of land under MLA is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that BLM has "plenary authority over oil and gas leasing" and broad discretion with respect to decisions to lease. *See* Penroc Oil Corp., et al., 84 IBLA 36, 39, GFS (O&G) 8 (1985), and cases cited therein.

> Withdrawing the protested parcels from the lease sale until proper pre-leasing analysis has been performed is a proper exercise of BLM's discretion under the MLA. BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with applicable law. (Colorado Environmental Coalition *et al.* 2004, pp. 12-15)

Therefore, we strongly urge the BLM to not offer these parcels for lease.

III. THE FOREST SERVICE AND BLM HAVE NOT ENSURED THAT VIABILITY OF ALL NATIVE AND DESIRED NONNATIVE SPECIES WILL BE MAINTAINED

One of the Forest Service's most important duties is to protect the viability of wildlife and the diversity of life on lands it administers. We recognize that the applicability of these legal provisions is in question, but we believe it is prudent to comply with them because they may still apply.

1. The Forest Service Is Required to Maintain the Viability and Diversity of Wildlife Species.

a) NFMA Requires the Forest Service to Maintain the Viability of Species.

The NFMA regs are currently in flux and it is unclear what regulations the Manti-La Sal and Ashley are operating under currently, as well as what the Forest Plans require in terms of viability, so these arguments may still apply.

The National Forest Management Act (NFMA) directs the Secretary of Agriculture to issue regulations that will "provide for diversity of plant and animal communities ... in order to meet overall multiple-use objectives." 16 U.S.C. § 1604(g)(3)(B). Pursuant to this statute, the Forest Service adopted regulations that charge the agency with managing fish and wildlife habitat to maintain viable populations of existing native and desired non-native vertebrate species within the planning area. 36 C.F.R. § 219.19 (1995). The regulations state that:

> For planning purposes, a viable population shall be regarded as one which has the estimated number and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to ensure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.

36 C.F.R. § 219.19.[1] The "planning area" across which viable populations must be distributed is defined as the area of the National Forest System covered by a regional guide or forest plan. 36 C.F.R. § 219.3.

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[1] See also 36 C.F.R. § 219.27(a)(6), which provides:

The plain language of the regulations thus requires the Forest Service to protect the viability of species on land under its jurisdiction by determining:

> -- the estimated numbers and distribution of reproductive individuals across the planning area;
>
> -- that the estimated number and distribution of reproductive individuals would insure its continued existence within the planning area;
>
> -- that the habitat requirements necessary to support, at least, a minimum number of reproductive individuals have been met; and
>
> -- that the distribution of habitat ensures that individuals can interact with others in the planning area.[2]

Several courts have concluded that "the viability regulation requires the agencies to look to species populations -- not merely to habitat for hypothetical populations." Seattle Audubon

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> All [forest plan] management prescriptions shall ... [p]rovide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species under § 219.19 is maintained and improved to the degree consistent with multiple-use objectives established in the plan.

[2] Forest Service guidance on the one hand endorses the plain language of the regulation, and on the other hand, grossly misinterprets it.

> For example, the Forest Service Manual (FSM) defines "viable populations" as:
>
> [a] population that has the estimated numbers and distribution of reproductive individuals to ensure the continued existence of the species throughout its existing range ... within the planning area.

FSM 2670.5(22), WO Amendment 2600-95-7 (June 23, 1995). That definition is substantially similar to that contained in the first sentence of 36 C.F.R. § 219.19.

However, Forest Service guidance contradicts the plain language of the regulation, by providing that the Forest Service may "analyze the significance of potential adverse effects on the population or its habitat" in attempting to protect the viability of sensitive species. FSM 2670.32(4), WO Amendment 2600-95-7 (June 23, 1995) (emphasis added). By permitting the Service to focus only on habitat and to ignore population, distribution, and potential for reproductive success, the manual would nullify the language in the regulation regarding minimum populations. The FS cannot lawfully rely on an analysis of potential habitat and nothing else in its evaluation impacts to species viability. See Sierra Club v. Glickman, 974 F.Supp. at 936-38; Seattle Audubon Soc'y v. Lyons, 871 F.Supp. 1291, 1315-16 (W.D.Wash. 1994); Sierra Club v.
Martin, 168 F.3d at 7.

Society v. Lyons, 871 F.Supp. 1291, 1316 (W.D. Wash. 1994), aff'd sub nom Seattle Audubon Society v. Mosely, 80 F.3d 1401.

However, the Forest Service's duty to protect viable populations is not limited to individual species, for it also "requires planning for the entire biological community -- not for one species alone." Seattle Audubon Society v. Moseley, 798 F.Supp. 1484, 1489 (W.D. Wash. 1992) quoting unpublished March 7, 1991, Order on Motions for Summary Judgment and Dismissal.

A memorandum from the Chief's office provides relevant guidance on the meaning of the population viability requirement. The memorandum emphasizes that "it is essential" that size and distribution of management areas "should be based on the specific biological requirements of the management indicator species such as home range size and dispersal capabilities." Hilmon (1982) at 1. Furthermore, "distribution of habitat [must] enable individuals to move among suitable habitat within their existing range" and the species' "general distribution" must not be affected by reductions in density. Id.

b) The Forest Service's Duty to Protect Species Viability Applies with Special Force to 'Sensitive Species.'

The duty to ensure viable or self-sustaining populations applies with special force to "sensitive" species. Or. Natural Resources Council v. Lowe, 836 F.Supp. 727, 733 (D.Or. 1993) (sensitive species "require additional attention" under viable population provision); Or. Natural Resources Council v. Marsh, 52 F.3d 1485, 1490-91 (9th Cir. 1995). Sensitive species are those species:

> for which population viability is a concern because they have significant current or predicted downward trends in population numbers or density, or for which there is a significant downward trend in their current or predicted habitat which would reduce their distribution.

Id.; see also FSM Supp. § 2670.5(19), WO Amendment 2600-95-7 (1995).

The FS has adopted guidance to monitor and protect sensitive species. The purpose of protecting sensitive species is, among other things,

> to ensure their viability and to preclude trends toward endangerment that would result in the need for Federal listing.

FSM §§ 2672.1.

Guidance also directs Forest Supervisors to "determine [the] distribution, status, and trend of threatened, endangered, sensitive, and proposed species and their habitats on National Forest System lands." FSM §§ 2670.45(4). To avoid future problems with population viability, the USFS must take proactive measures to insure that populations of imperiled species do not continue to drop to the point where listing is necessary. The agency must "[d]evelop and implement management practices to ensure that species do not become threatened or endangered ..." FSM §§ 2670.22(1). District Rangers must also conduct "necessary biological evaluations"

and "ensure compliance with procedural and biological requirements for sensitive species." FSM §§ 2670.46(1) and (4).

NFMA, its regulations, and FS guidance require that FS project level decisions comply with NFMA's viability provision. Federal courts have also held that project level decisions must not result in a loss of viability. See *Inland Empire*, 88 F.3d at 760 n.6; *Neighbors of Cuddy Mountain v. United States Forest Service,* 137 F.3d 1372, 1376 (9th Cir. 1998). FS guidance states that for specific management proposals "[t]here must be no impact to sensitive species without an analysis of the significance of adverse effects on the populations, its habitat, and on the viability of species as a whole." FSM §§ 2672.1.

To assist in achieving this goal, USFS guidance dictates that the agency assess the impact of proposed project-level actions on sensitive species through the use of project-level "biological evaluations" or BEs. FSM §§ 2672.4; FSM §§ 2670.32. The goal of a BE is to, among other things, "ensure that Forest Service actions do not contribute to loss of viability" of such species. FSM §§ 2672.41. As part of each project-level analysis, the FS must prepare biological assessments or evaluations which identify those "factors that may affect the continued downward trend of the population, including such factors as: distribution of habitats, genetics, demographics, habitat fragmentation, and risk associated with catastrophic events" across the geographic range of the species. FSM §§ 2621; see also FSM §§2670.32(2).

Because the Forest Service has not ensured that leasing the parcels in this sale will not violate NFMA, all Forest Service parcels should be withdrawn.

IV. THE FS HAS FAILED TO COMPLY WITH NFMA'S MANDATES TO GATHER INFORMATION CONCERNING MANAGEMENT INDICATOR SPECIES.

Regulations implementing the National Forest Management Act (NFMA) create a general obligation that the Forest Service gather and keep data to ensure species diversity in the planning area. 36 C.F.R. § 219.26 states in relevant part:

> Forest Planning shall provide for the diversity of plant and animal communities and tree species consistent with the overall multiple use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.

36 C.F.R. § 219.19 specifically requires that the Forest Service monitor the population of Management Indicator Species (MIS), stating:

> Fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. . . . (1) In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species . . . . (6) Population trends of the management indicator species will be monitored and relationships to habitat changes determined

These NFMA regulations obligate the FS to maintain population data on MIS.

> [T]he Forest Service's approval of the timber sales without gathering and considering data on the MIS is arbitrary and capricious. The regulations require that MIS be monitored to determine the effects of habitat changes. The timber projects proposed for the Chattahoochee and Oconee National Forests amount to 2000 acres of habitat change. Yet, despite this extensive habitat change and the fact that the some MIS populations in the Forest are actually declining, the Forest Service has no population data for half of the MIS in the Forest and thus cannot reliably gauge the impact of the timber projects on these species.

Sierra Club v. Martin, 168 F.3d 1, 7 (11th Cir. 1999)(internal citations omitted). These regulations apply at both the Forest Plan and the site-specific project level. *Martin*, 168 F.3d at 6.

"The unambiguous language of the MIS regulations requires collection of population data." *Sierra Club v. Glickman*, 974 F.Supp. 905, 936 (E.D. Tex. 1997), injunction aff'd *sub nom. Sierra Club v. Peterson,* 185 F.3d 349, 359 (5th Cir. 1999). The Ninth Circuit and several district courts have also held that, where the FS failed to conduct MIS trend and population monitoring at a site-specific or plan level, the site-specific action must be enjoined until the appropriate survey and monitoring data is collected. *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996); *Sierra Club v. Glickman*, 974 F.Supp. at 936-38; Seat*tle Audubon Soc'y v. Lyons*, 871 F.Supp. 1291, 1315-16 (W.D.Wash. 1994), aff'd *sub nom.*

In addition, on October 2, 2001, the U.S. District Court for the District of New Mexico issued a Memorandum Opinion and Order in the case of Forest Guardians v. Forest Service (D.N.M. CV 00-714 JP/KPM-ACE) which supports this result. That opinion concludes that the Forest Service violated NFMA and implementing regulations by failing to develop population and trend data for MIS species, both at the Forest-wide and project level, in implementing a timber-removal project, the McGaffey timber sale. The District Court reached this conclusion based on an analysis of Tenth Circuit case law. Tenth Circuit jurisdiction overlaps with that of the Northern Region of the Forest Service.

There is thus a clear mandate that the FS gather population and trend data for MIS. To the best of our knowledge, the FS has not compiled population and trend data for all of its MIS, as required by law and regulation. The FS must obtain this information before it makes a decision that could permit destruction of potentially important wildlife habitat in conjunction with mineral development. Therefore, all Forest Service parcels should be withdrawn from this sale.

V. Notification and Section 7 Claims for Forest Service parcels

By not including the Forest Service parcels in the preliminary list, the BLM may have violated its own public notification requirements. By not providing the Forest Service parcel list to FWS for review and by not entering into Section 7 consultation on the Forest Service parcels, both

agencies may be in violation of the ESA. For these reasons, all Forest Service parcels should be withdrawn from this sale.

VI. Additional Forest Service parcel claims

We hereby incorporate by reference Western Resource Advocates's protest of this lease sale and all the arguments it contains. We concur that Forest Service parcels should be withdrawn from this sale.

VII. Conclusion and request for relief

CNE therefore requests that the BLM withdraw the protested parcels from the November 2005 sale.

Sincerely,

Jacob Smith
Executive Director

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